

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE

Assigned on Briefs May 16, 2006

**STATE OF TENNESSEE v. DONNA BEATRICE KISER**

**Direct Appeal from the Criminal Court for Loudon County**  
**No. 10937 E. Eugene Eblen, Judge**

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**No. E2005-02489-CCA-R3-CD - Filed July 27, 2006**

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The Defendant, Donna Beatrice Kiser, was convicted of driving under the influence (“DUI”), second offense. The Defendant contends that there is insufficient evidence to sustain her conviction. Finding no reversible error, we affirm the judgment of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed**

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which DAVID H. WELLES and NORMA MCGEE OGLE, JJ., joined.

Kent L. Booher, Lenoir City, Tennessee, (on appeal) and Charles B. Hill, Kingston, Tennessee (at trial), for the appellant, Donna Beatrice Kiser.

Paul G. Summers, Attorney General and Reporter; Blind Akrawi, Assistant Attorney General; Scott McCluen, District Attorney General; and Frank Harvey, Assistant District Attorney General for the appellee, State of Tennessee.

**OPINION**

**I. Facts**

This case arises from the Defendant’s conviction for DUI, second offense. At the Defendant’s bench trial for this offense, the following evidence was presented: Joe Foster, a canine handler with the Lenoir City Police Department, testified that, after responding to a dispatch call about a white Buick, he saw a white Buick driving through town in the turn lane. He followed this vehicle for two blocks, and the vehicle remained in the turn lane the entire time he followed it. The officer said that he pulled this car over and spoke with the Defendant, who was driving the car. Officer Foster noticed that, while he talked to the Defendant, she slurred her speech, and she told him that she was on some medication. He asked the Defendant to perform the “one-legged stand” field sobriety test, and the Defendant could not perform this test. The officer then asked the Defendant

how far she had gotten in school, and the Defendant told him “high school.” He asked her to recite the ABCs, but she could not. Officer Foster testified that, at that point, he determined that the Defendant was under the influence of an intoxicant. He explained that he called another officer, Sonny Grubb, to transport the Defendant to the hospital so that a blood test could be performed. After Officer Foster advised the Defendant of the implied consent law, the Defendant agreed to submit a sample of her blood for analysis. Officer Foster agreed that he “left it to Officer Grubb” to obtain the blood sample, and he received a report regarding this analysis from the crime lab.

On cross-examination, Officer Foster testified that, when he pulled the Defendant over, he did not smell any alcoholic beverages. The officer said that the Defendant never weaved while she was in the turn lane, but she remained in the turn lane for two blocks. He acknowledged that he turned on his siren when he stopped the Defendant and that she safely crossed over two lanes of traffic to pull over. Officer Foster asked the Defendant “what she was doing driving in the center lane” and noticed that her speech was slurred when she responded. The Officer conceded that he did not know of any law that the Defendant broke by driving in the turn lane. The Officer said that the Defendant was unsteady on her feet when she exited her vehicle. Officer Foster stated that he was going to have the Defendant do the “one-legged stand” test while counting from 1001 to 1030, and the Defendant said she did not know if she could perform the test. He acknowledged that the Defendant may have told him that she had a broken big toe. Officer Foster did not recall if the Defendant was wearing boots that were too big for her, if she attempted to complete the “one-legged stand” field sobriety test while barefoot, or if she had bruised toes and feet. Officer Foster recalled that, after the Defendant said that she could not perform this field sobriety test, he told her to try to complete the test on either foot upon which she felt comfortable standing. Immediately after the Defendant attempted to complete the test, Officer Foster asked her to stop because she was swaying. Officer Foster described how the Defendant began to recite the alphabet well, but then started to miss letters when she got to the middle of the alphabet. The Officer conceded that he could not remember what letter the Defendant failed on the test. Officer Foster testified that he did not have any notes or videotapes that recorded the Defendant’s performance on these tests.

Officer Foster recalled that he stopped the Defendant’s vehicle several years earlier, and he searched her car as a result of that earlier stop. He said that the Defendant drove a different vehicle then. Officer Foster testified that he and the Defendant waited less than ten minutes before Officer Grubb arrived. Officer Foster testified that it was during this time that the Defendant said she had taken some medication. The officer said that, while they were waiting for Officer Grubb, they got along. The officer noticed that the Defendant was slurring her speech and staggering. After Officer Grubb arrived, he took the Defendant with him. Officer Foster testified that he later met Officer Grubb at the jail. There, Officer Grubb turned over to him the Defendant’s paperwork and vial of blood. Officer Foster said that he sent the blood to the lab in Knoxville for testing.

Sonny Grubb, a patrolman for the Lenoir City Police Department, testified that he assisted Officer Foster with the Defendant’s arrest. He agreed that he transported the Defendant to the hospital to have her blood drawn, that he was present at the hospital when the blood sample was taken from the Defendant, and that he took possession of the blood sample. Officer Grubb said that

he then transported the blood sample and the Defendant to the jail. There, he gave the blood sample to Officer Foster and turned custody of the Defendant over to the jail.

On cross-examination, Officer Grubb testified that the hospital drew blood from the Defendant's arm but he could not recall from which arm that the blood was taken. He testified that hospital personnel put the blood that was drawn into vials and put those vials into a box. Officer Grubb said that he took this box to Officer Foster at the jail. He testified that he was fairly certain that he gave this vial to Officer Foster, while acknowledging that after two and a half years he could not remember "with a hundred percent accuracy."

Michael J. Lyttle, a special agent forensic scientist with the Tennessee Bureau of Investigation (TBI) Crime Laboratory, testified that, during the time of this incident, he worked as a forensic toxicologist with the crime lab. Agent Lyttle said that he received a request for examination form along with a blood alcohol kit, provided by the TBI, which contained two vials of blood. He testified that he performed a toxicology report on blood and urine samples taken from the Defendant. He testified that he found several drugs in both the Defendant's blood and urine. He explained that the urine test only shows positive or negative results, but he was also able to successfully perform a toxicology examination of the Defendant's blood. Further, he explained that levels of drugs can be divided into therapeutic ranges, toxic ranges, or lethal ranges, and the therapeutic range of a drug constitutes the levels in which one would expect to find the drug in a medically useful dose. Agent Lyttle testified that he found dihydrocodeinone or hydrocodone, a painkiller and an opiate-type drug, in the Defendant's system, but he did not know if dihydrocodeinone was a scheduled drug. Agent Lyttle also found Alprazolam, an anti-anxiety drug commonly known as Xanax, at twice the top therapeutic level. Agent Lyttle also found the following drugs in the Defendant's system in amounts that fell within the therapeutic ranges of the drugs: Diazepam, an anti-anxiety drug commonly known as Valium; Nordiazepam, a metabolite of Diazepam; Carisprodal, a muscle relaxant commonly known as Soma; Meprobamate, a metabolite of Carisprodol; and Phentermine, a central nervous stimulant that is very similar to Methamphetamine and is "one-half of" the popular diet drug, Phen-Phen. He testified that all of these drugs could interact with each other and create "synergistic effects." He defined "synergistic effects" with the following statement:

[I]f you were to assign a value to each drug of their impairment, if the level [for] Alprazolam impairment was a one, and the level for Diazepam impairment was one, additively, if you combine them, you would get an impairment level of two. But when you have synergistic effects going on, you have the possibility of effects of three or four, or even five. Effects that seem greater than they should be for the two drugs combined, when [they are] given in combination.

On cross-examination, Agent Lyttle agreed that the amount of a drug, such as Xanax, in a person's system is just one factor, and he explained that, when evaluating whether an individual is under the influence of drugs, one must analyze other factors such as that individual's behavior both before they are pulled over and during field sobriety testing. He explained that another possible

factor is how long a person has been taking a medication because there is a possibility of tolerance to certain medications, which would vary the levels of drugs you would expect to see versus their effect. Lyttle also testified that the lethal range for Alprazolam actually begins at half the level of the substance that he found in the Defendant's system. He further noted that, if he had this level of Alprazolam in his system, he would most likely be dead. He testified that the Defendant must have developed some tolerance to Alprazolam because the level of Alprazolam found in the Defendant's system was not lethal to her. Agent Lyttle testified that, because of tolerance and because people respond to drugs differently, it is possible that this level of Alprazolam was at a therapeutic level for the Defendant. The agent clarified that a therapeutic level for a tranquilizer, a central nervous system depressant, or muscle relaxant, which were the majority of drugs found in the Defendant, "would not be consistent with operating a motor vehicle." He said that the levels could not be properly evaluated without seeing the field sobriety testing, and the behavior of the individual under the influence of those drugs.

On redirect examination, Agent Lyttle acknowledged that the therapeutic levels for drugs are set by the medical community and are drawn from literature. He testified that the medical community has established low therapeutic levels and high therapeutic levels in order to account for the different ways that drugs affect different individuals and for individual tolerance levels.

The parties agreed that the Defendant's blood was negative for the presence of alcohol.

Tony Viers testified that he saw the Defendant on the day she was arrested at around 2:00 p.m. when she was cooking him lunch. He said she seemed "[g]ood" and was not staggering. He said she did not appear to be under the influence of any drug. On cross-examination, Viers testified that he has known the Defendant for ten years and has never known her to be a heavy drug user. He further testified that he has never seen her take drugs, take any pills, or seen any pill bottles lying around. He testified that the Defendant has not talked to him about the pills that she takes. Viers said that he has never noticed anything about the Defendant that made him wonder if she might be under the influence of drugs. He said that the Defendant did not complain about anything when he saw her the day she was arrested. He testified that he probably saw the Defendant the day after she was arrested and that she did not complain about any physical problems. On redirect examination, Viers testified that a horse had previously stepped on the Defendant's foot and that the Defendant broke her foot or her toe. He also recalled that, at one point, the Defendant had been shot. He said that he thought that the gunshot wound caused her trouble. Viers said that the Defendant's speech was not normally slurred.

Robert Hardy testified that he has known the Defendant for five or six years. He testified that he saw the Defendant on the day she was arrested around 2:00 p.m. when he came over for lunch. He did not recall hearing that a horse had stepped on the Defendant. He said that the Defendant did not appear to be under the influence of any drug. On cross-examination, Hardy acknowledged that the Defendant was walking and talking fine on the day of her arrest. He testified that she appeared as she always appeared to him. Hardy testified that he did not have any knowledge about the Defendant's drug use, never saw her take any pills, and never saw any pill bottles lying around her

house. He further testified that he never saw the Defendant in a condition where he thought that the Defendant was “messed up.”

The Defendant testified that she is unemployed and on disability because she has a mental and physical disability. She said that, in November of 2001, she received a gunshot wound to her left shoulder and that she became depressed and anxious after receiving this wound. She testified that, on the day of her arrest, the only medication she had taken was some Soma pills around 8:00 a.m. The Defendant said that she had been prescribed Soma in approximately August of 2001. She said that she took a 1.0 milligram Xanax on the night before she was arrested and that she has been taking Xanax since mid-2001 as prescribed by Dr. Laman. The Defendant testified that Dr. Laman, who was now dead, also prescribed her Valium. She said that she had been taking these three medications since before her gunshot wound.

The Defendant described how her horse stepped on her foot. She said that, after this incident, her foot was purple, she knew that her foot was broken, but she did not go to see a doctor. The Defendant explained that, when she first started taking the Soma, she could not do anything for two to three hours after taking the pill. The Defendant explained that she took the pill early in the morning so that she could go to Wal-Mart later in the day. She said that she fed Johnny Viars, Tony Viars, and Robert Hardy at about 2:00 p.m. and then at around 2:35 to 2:45 p.m. she got in her car to go to Wal-Mart. The Defendant described how she drove from her home in Loudon to Lenoir City. She said that she did not have any trouble driving and that she drove past police officers and the Justice Center. She recalled being pulled over when she reached Lenoir City. She said that she was in the far right lane, and not the turn lane, when she was pulled over.

The Defendant said that, after the police officer pulled her over, she told the police officer that she had taken a Soma at 8:00 a.m. and that enough time had passed since she took the pill to ensure that the pill would no longer affect her. The Defendant offered photographs of her hurt foot and a copy of her prescription profile, which showed prescriptions for Diazepam, Trazadone, and Alprozolam, and the trial court admitted those into evidence. The Defendant testified that the Officer asked her to step out of her car, which she did. She said that she immediately told the Officer about her foot injury and that she had weak ankles. Further, she said that she did, in fact, recite her ABCs. Additionally, the Defendant said she was wearing boots that were too loose and that had spurs. The Defendant said that she did not feel impaired when she drove her car on the day of her arrest. She testified that she has enough experience with the effects of her medications to know when she would have trouble operating a car. She said that she knew exactly how her medications affected her and that she did not leave her house until 2:30 p.m. to ensure that she was not impaired by her medications.

On cross-examination, the Defendant testified that she took the Soma in the morning because she was in unbearable pain. She agreed that Soma was a muscle relaxer and not a pain medication. She reiterated that she had taken Xanax the night before. She thought that the level of Xanax may have been high in her system because she has been prescribed up to 124 pills a month. The Defendant testified that she received prescriptions from five different specialists, but all her doctors

communicated with each other and knew what medicines the other doctors had prescribed to her. When asked when, immediately before her arrest, she last took some of the drugs found in her system, the Defendant could not recall exactly when she took the pills. The Defendant explained that:

[T]hey've had me on so many different medications for so long. And, you know, they want me to take three of four of this a day, three or four of that a day. And I just get tired of taking pills. So sometimes I take a little less of some of the other ones, and take a little more of the other.

She testified that she always cleared any adjustments that she made to her medications with her doctors. The Defendant denied ever taking Adipex, the amphetamine-like drug. She testified that her doctors agreed that she could have Dihydrocodeinone, Valium, Soma, Xanax, and perhaps an amphetamine-like substance in her system simultaneously. The Defendant testified that she took a Valium and a Hydrocodone the night before trial, but nothing on the day of trial.

Johnny H. Viars testified that he has lived with the Defendant for the past five years, and she is his girlfriend. He said that, on the day of her arrest, he saw the Defendant during his lunch hour. He said that, when he saw her, the Defendant appeared "[n]ormal," and he did not think that she was under the influence of her medication. He said that she was complaining about her foot hurting, and she was limping. He testified that the Defendant does not become weird or crazy when she takes her medication. Viars also said that you can tell a difference in the Defendant's speech when she does not have her "partial" in her mouth.

Based upon this evidence, the trial court found the Defendant guilty of DUI. The parties agreed that the conviction was the Defendant's second offense. The trial court sentenced the Defendant to eleven months and twenty-nine days in a community based alternative with fifty days to serve in incarceration in the county jail. The trial court also suspended the Defendant's driving privileges for two years and fined the Defendant \$600.00.

## **II. Analysis**

On appeal, the Defendant contends that there is insufficient evidence to sustain her conviction. Specifically, the Defendant argues that the State failed to prove beyond a reasonable doubt that she was under the influence of any intoxicant, narcotic drug or drug producing a stimulating effect on the nervous system. The State contends that, because the evidence is sufficient to sustain the Defendant's conviction, this issue is without merit. The State notes that the evidence presented at trial established that the Defendant was driving under the influence of narcotic drugs because she drove her car in the turn lane for at least two blocks, had slurred speech, was unsteady on her feet, and failed to perform two field sobriety tests.

When an accused challenges the sufficiency of the evidence, this Court's standard of review

is whether, after considering the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Tenn. R. App. P. 13(e); State v. Goodwin, 143 S.W.3d 771, 775 (Tenn. 2004) (citing State v. Reid, 91 S.W.3d 247, 276 (Tenn. 2002)). This rule applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. State v. Pendergrass, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999).

In determining the sufficiency of the evidence, this Court should not re-weigh or re-evaluate the evidence. State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Nor may this Court substitute its inferences for those drawn by the trier of fact from the evidence. State v. Buggs, 995 S.W.2d 102, 105 (Tenn. 1999); Liakas v. State, 286 S.W.2d 856, 859 (Tenn. 1956). Questions concerning the credibility of the witnesses, the weight and value of the evidence, and all factual issues raised by the evidence are resolved by the trier of fact. Liakas, 286 S.W.2d at 859. “A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State.” State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973). Our Supreme Court stated the rationale for this rule:

This well-settled rule rests on a sound foundation. The trial judge and the jury see the witnesses face to face, hear their testimony and observe their demeanor on the stand. Thus the trial judge and jury are the primary instrumentality of justice to determine the weight and credibility to be given to the testimony of witnesses. In the trial forum alone is there human atmosphere and the totality of the evidence cannot be reproduced with a written record in this Court.

Bolin v. State, 405 S.W.2d 768, 771 (Tenn. 1966) (citing Carol v. State, 370 S.W.2d 523 (Tenn. 1963)). This Court must afford the State of Tennessee the strongest legitimate view of the evidence contained in the record, as well as all reasonable inferences which may be drawn from the evidence. Goodwin, 143 S.W.3d at 775 (citing State v. Smith, 24 S.W.3d 274, 279 (Tenn. 2000)). Because a verdict of guilt against a defendant removes the presumption of innocence and raises a presumption of guilt, the convicted criminal defendant bears the burden of showing that the evidence was legally insufficient to sustain a guilty verdict. Id.; see State v. Carruthers, 35 S.W.3d 516, 557-58 (Tenn. 2000).

Under Tennessee law, to support a conviction for DUI, the State is required to prove, beyond a reasonable doubt, that the Defendant was driving or “in physical control of any automobile or other motor driven vehicle on any of the public roads and highways of the state, or on any streets or alleys . . . while . . . under the influence of any intoxicant, marijuana, narcotic drug, or drug producing stimulating effects on the central nervous system. . . .” Tenn. Code Ann. §55-10-401(a)(1) (2003). “The fact that any person or persons who drive while under the influence of narcotic drugs, or shall drive while under the influence of barbitol drugs, is or has been entitled to use such drugs under the laws of this state, shall not constitute a defense to the violation of §§ 55-10-401 -- 55-10-404.” Tenn. Code Ann. § 55-10-402 (2003). This Court has previously found sufficient evidence to sustain DUI convictions based on a defendant’s behavior, prescription medications found in the defendant’s

systems, and expert testimony. See State v. Albert L. Norton, No. 03C01-9707-CR-00270, 1999 WL 508654 \*1-5 (Tenn. Crim. App., at Knoxville, July 20, 1999), *no Tenn. R. App. P. 11 application filed* (finding sufficient evidence to sustain the defendant's DUI conviction due to the presence of three types of pain medication, an inability to perform field sobriety tests, and expert testimony regarding the possible effects of the medication); State v. Kenneth Lee Abbott, No. 02C01-9311-CC-00263, 1995 WL 422810 \*1-5 (Tenn. Crim. App., at Jackson, July 19, 1995), *perm. app. denied* (Tenn. Dec. 28, 1995) (finding sufficient evidence for a DUI conviction after the Defendant's blood test revealed the presence of two tranquilizer drugs, one being within the therapeutic range and one being well above therapeutic levels).

A criminal offense may be established exclusively by circumstantial evidence. State v. Rains, 882 S.W.2d 376, 380 (Tenn. Crim. App. 1994) (citing State v. Haile, 658 S.W.2d 547, 552 (Tenn. Crim. App. 1983)). However, before an accused can be convicted of a criminal offense based on circumstantial evidence alone, the facts and circumstances “must be so strong and cogent as to exclude every other reasonable hypothesis save the guilt of the defendant . . . .” Id. (quoting State v. Crawford, 470 S.W.2d 610, 612 (Tenn. 1971)). “In other words, a web of guilt must be woven around the defendant from which he cannot escape and from which facts and circumstances the jury could draw no other reasonable inference save the guilt of the defendant beyond a reasonable doubt.” Id. (quoting Crawford, 470 S.W.2d at 613). We note that this Court has often found that an arresting officer's testimony alone is sufficient to support a defendant's conviction for DUI. See, e.g. State v. Vassar, 870 S.W.2d 543, 544 (Tenn. Crim. App. 1993).

In the case under submission, elements one and two, that the Defendant was driving a motor vehicle and on a public road, are uncontroverted. The Defendant contends that there was insufficient evidence presented to prove element three, that she was under the influence of a narcotic drug or a drug producing stimulating effects on the central nervous system. We disagree. Viewing the evidence in the light most favorable to the State, it proves that, at the time of her arrest, the Defendant had several drugs in her system and that these drugs impaired her ability to drive. Toxicology tests performed on the Defendant's blood sample revealed that Dihydrocodeinone, Diazepam, Nordiazepam, Carisprodal, Meprobromate, Phentermine, and lethal levels of Alprazolam in her system. Under Tennessee Code Annotated section 39-17-410(e)(3) (2003), Dihydrocodeinone is specifically designated as a narcotic drug and a schedule III controlled substance. We also note that Tennessee Code Annotated section 39-17-412(e)(5) (2003) describes Phentermine as a drug that has a stimulating effect on the central nervous system. Agent Lyttle testified that the combination of these substances could have a “synergistic effect,” increasing the impairing effects that they had on the Defendant. Furthermore, the Defendant acknowledged that, on the day she was arrested, she took some Soma pills, which had previously impaired her ability to function. Officer Foster testified that, on the day of her arrest, the Defendant drove her car in the turn lane for two blocks, slurred her speech, was unsteady on her feet, failed to recite the alphabet, and could not perform the “one-legged stand” field sobriety test. We conclude that this evidence is sufficient for a rational trier of fact to find the essential elements of driving under the influence beyond a reasonable doubt. The Defendant is not entitled to relief on this issue.



### **III. Conclusion**

In accordance with the foregoing, we conclude that the trial court committed no reversible error. Therefore, the judgment of the trial court is affirmed.

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ROBERT W. WEDEMEYER, JUDGE